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Supreme Court, U.S.
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No. _____

In The
SUPREME COURT
UNITED STATES OF AMERICA

Norman J. Bau
Petitioner,
vs.
Actamed Corporation
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA:

PETITION FOR WRIT OF CERTIORARI

Norman J. Bau
Petitioner, Pro Se
3764 Pinebrook Dr.
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24 pp

QUESTION PRESENTED FOR REVIEW

That the judgment of the Court of Appeals of the State of Georgia in this Action violates the Petitioner's Constitutional Rights, relative to the right to equal protection under the law, as set out in the 14th Amendment of the Constitution of the United States of America. "No state shall deny to any person the equal protection of the laws."

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Georgia.

PROCEEDINGS AND OPINIONS BELOW

A copy of the judgment of the State Court of Fulton County is contained in the Appendix (App. 1).

A copy of the Opinion of the Appeals Court of Georgia, 254 Ga. App. 573, 562 S.E.2d 734 (2002), affirming the judgment of the State Court of Fulton County is contained in the Appendix (App. 2-6).

A copy of the order of the Appeals Court of Georgia denying the Petitioner's Motion for Reconsideration is contained in the Appendix (App. 7).

A copy of the order of the Supreme Court of Georgia denying the Petition for Certiorari is contained in the Appendix (App. 8).

A copy of the order of the Supreme Court of Georgia denying the Petitioner's Motion for Reconsideration is contained in the Appendix (App. 9).

STATEMENT OF THE BASIS FOR JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: Article III, Section 2 of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, of the Constitution of the United States provides:

No state shall ... deny to any person within its Jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was a former employee of the Respondent and brought suit against the Respondent for Breach of Contract, acting pro se. Both parties filed motions for Summary Judgment, and the Trial Court granted Summary Judgment to the Respondent. The Petitioner appealed this ruling, and the Court of Appeals of Georgia affirmed the ruling, conducting a de novo review.

The Court of Appeals noted that the Agreement contained a provision entitled "Change In Control," which provided that:
[n]othwithstanding any provision in this Agreement to the contrary, in the event of a 'change in control' of the Company while the Optionee is in 'continuous employment with the Company' (as defined in paragraph 3(b)), this Option shall become immediately exercisable in full. For the purposes of this paragraph ... a 'change in control' of the Company shall be deemed to occur if (i) the Company is a party to a merger, share exchange or other business combination pursuant to which the company does not survive or survives as a subsidiary of another corporation; or (ii) all or substantially all of the assets of the Company are sold or otherwise disposed of.

The Court of Appeals noted that on February 24, 1998,

the Respondent entered into an "Agreement and Plan of Reorganization" to merge with Healtheon Corp., and also noted that on May 1, 1998 (18 days prior to the completion of the Merger), the Respondent terminated the employment of the Petitioner, on May 23, 1998, the Petitioner sought to purchase the 3,200 Merger shares, and that the Respondent refused to grant the Petitioner the option to purchase the Merger shares because (in the opinion of the Respondent) these options had not vested.

The Court of Appeals stated: 'In eight enumerations, Bau argues that there was a "change in control" of Actamed on February 24, when the plan of reorganization was signed, and that therefore Actamed had become a "party to a merger" under the "Change in Control" provision of his stock option plan.' This is an incorrect statement, as to the Petitioner's argument. The Petitioner's brief argued that the Respondent became a party to a merger on February 24, and under the "Change In Control" provision of the Agreement, a "Change In Control" was occurring during the time interval from February 24 through May 19, on which date the Merger was approved by the stockholders.

The Court of Appeals stated: "...Actamed became a party to a merger on May 19, 1998...," "To be a party to a merger, there must be a merger, not simply a plan to merge," and 'we see no basis for extending the phrase "if the Company is a party to a merger" to begin the date when the plan or reorganization between companies was signed in February...'

REASON FOR GRANTING THE PETITION

Georgia case law stated: "Dictionaries may supply a plain

and ordinary sense of a word," (Shopping Ctr. v. Basic Bus. Alternatives, Inc., 213 Ga App 722, 445 S.E.2d 824 (1994)).
Webster's dictionary defines "party" as: one participating, or otherwise involved in something. (Norman J. Bau Affidavit, #12) [R-287]. When the Respondent entered into an Agreement and Plan of Reorganization to merge with Healtheon Corp. on February 24, 1998, the Respondent began participating in a merger and was involved in a merger. Georgia case law therefore infers that the Respondent became a "party to a merger" on February 24, 1998.

The Georgia statute [O.C.G.A. § 14-2-1103] states: "After adopting a plan of merger ... the board of directors of each corporation party to the merger [emphasis supplied by the Petitioner] ... shall submit the plan of merger ... for approval by its shareholders." The Georgia statutes therefore reference the Respondent as a "party to the merger" when the Agreement and Plan of Reorganization was approved by the Board of Directors of the Respondent, on February 24, 1998. The Georgia statute [O.C.G.A. § 24-6-5] states: "Evidence of known and established usage shall be admissable to aid in the construction of contracts..."

Article 1, Section I, Paragraph II of the Constitution of the State of Georgia states, "No person shall be denied the equal protection of the laws." Amendment XIV, Section 1, of the Constitution of the United States states: "No state shall ... deny to any person within its Jurisdiction the equal protection of the laws." Article 1, Section I, Paragraph II of the Constitution of the State of Georgia and Amendment XIV, Section 1, of the Constitution of the United States are substantially equivalent.

"Equal protection clause of the fourteenth amendment announces a fundamental principle: the State must govern impartially." Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L.Ed.2d 118 (1981). Previous challenges to state governance which referenced Amendment XIV were in relation to State statutes which were not impartial with respect to one class of individuals versus another class of individuals. An implicit presumption is that the State Courts will apply the statutes uniformly. The Petitioner hereby contends that the State does not govern impartially, when the State Courts do not apply the State statutes uniformly. That is, the equal protection guarantees of the Petitioner under Amendment XIV are being violated when the State Courts do not apply the State statutes uniformly. When this occurs, there exists a class of individuals which receive a proper application of a State statute, and an alternate, distinct class of individuals which receive an improper and incorrect application of a State statute, by the State Courts.

The guarantee of "equal protection" under the laws represents a mandate that the laws will be applied uniformly. When the Georgia case law infers that the Respondent became a "party to a merger" on February 24, 1998, and the Court of Appeals of Georgia will not apply that case law to the present Action, the Petitioner is being denied the equal protection of the law. When the Georgia statutes O.C.G.A. § 14-2-1103 and O.C.G.A. § 24-6-5 references the Respondent as a "party to the merger" on February 24, 1998, and the Court of Appeals of Georgia will not apply that reference to the present Action, the Petitioner is being denied the equal protection of the law. The Petitioner is being denied the equal protection of the laws because the inferences of the Case Law, O.C.G.A. § 14-2-1103, and O.C.G.A. § 24-6-5 are not being applied uniformly. The State is not governing impartially.

Pursuant to the de novo review by the Court of Appeals of Georgia, the Petitioner raised this Constitutional challenge in the Petition for Certiorari (Page 3) to the Supreme Court of Georgia, and the Appellant's Motion for Reconsideration (Pages 1 and 2) to the Supreme Court of Georgia.

Hence:

1) The Respondent became a party to a merger on February 24, 1998.

2) Section 1(c) of the Agreement states: A 'change in control' of the Company shall be deemed to occur if ... the Company is a party to a merger ... pursuant to which the company ... survives as a subsidiary of another corporation. [R-013]

3) The Respondent survived as a subsidiary of Healtheon Corp. on May 19, 1998, when the Merger was approved by the shareholders. (Lewis R. Belote Affidavit, #2 (Dated June 2, 2000)) [R-169]

4) A Change in Control of the Respondent occurred between the date it became a party to the Merger, February 24, 1998, and the date it survived as a subsidiary of Healtheon, May 19, 1998. [From (2), (1), and (3) above]

5) The Petitioner was in continuous employment with the Respondent during the period February 24, 1998 through May 1, 1998. (Norman J. Bau Affidavit, #3) [R-286]

6) Section 1(c) of the Agreement states: Notwithstanding any provisions in this Agreement to the contrary, in the event of a "change in control" of the Company while the Optionee is in "continuous employment with the Company" ... this Option shall become immediately exercisable in full. [R-013] Since the Petitioner was in continuous employment while the Change in Control was occurring, but not in continous employment when the Change in Control was completed, this clause is ambigous, and requires construction by the Court.

7) "In construing contracts it is important to look to the substantial purpose which must be supposed to have influenced the minds of the parties, rather than at the details of making such purpose effectual." Illges v. Dexter, 77 Ga 36 (1886).
8) The Respondent's purpose in offering the Merger Options was to induce the Petitioner into remaining in continuous employment until the Change in Control was completed.
9) This was the intent of the Petitioner, however this intent was obstructed by the Involuntarily Termination of the Petitioner, by the Respondent, while the Change in Control was occurring. Therefore, the Merger Options became exercisable upon the completion of the Change In Control.
10) The Merger Options became fully vested upon the completion of the Change in Control, on May 19, 1998, due to this obstruction of intent by the Respondent. Due to the "Notwithstanding any provisions in this Agreement to the contrary" clause contained in (6) above, the Termination clause of the Agreement is irrelevant.

In Illges v. Dexter [Illges v. Dexter, 77 Ga 36 (1886).] the original agreement between the stockholders and Garrard contained a provision to sell the railroad to General Logan, through his agent Garrard, for $100,000. Eventually, this agreement with Garrard was extended to Dexter. Dexter contended that he could buy the railroad for $100,000 and keep it; Illges contended that Dexter became an agent for the stockholders to sell the railroad to General Logan for $100,000.

The Court held that the rights which Dexter had under the contract were the rights which Garrard had, which, literally, was an option to buy at the price of $100,000, as agent for General Logan. But, the Court held, "In

construing contracts it is important to look to the substantial purpose which must be supposed to have influenced the minds of the parties, rather than at the details of making such purpose effectual."

Based upon this principle, the Court held that the stockholders had no interest or purpose in who should purchase the railroad, but their primary interest and purpose was in the price at which it should be sold, and therefore, that Dexter could buy the railroad for himself or another, provided he paid $100,000.

Since Section 1(c) of the Agreement is ambiguous, as described above in (6), the "substantial purpose which must be supposed to have influenced the minds of the parties," relative to the Merger Options, is of paramount importance.

The Respondent's purpose and interest in offering the Merger Options is to deter the Petitioner from terminating his employment with the Respondent, while the Change in Control is occurring (due to the threat of subsequent downsizing, after the Change in Control is completed). If too many employees resign while the Change in Control is occurring, the Respondent's business materially changes, and Healtheon Corp. could cancel the Merger. [R-174 through R-237]. This would cause a dramatic financial loss to the Respondent, in the failure of it's stock to appreciate in price and value.

The Petitioner's purpose and interest in the Merger Options was expressed in his intent to remain in continous employment, while the Change in Control was occurring. This intent was obstructed by the Respondent's Involuntary termination of the Petitioner's employment, about 18 days before the completion of the Change in

Control.

The Respondent offers no discussion on the substantial purpose of the Merger Options, and relies on the "details of making such purpose effectual," (as discussed in Illges v. Dexter), in an attempt to prevail. Just as the stockholders had no purpose or interest in who bought the railroad in Illges v. Dexter [citation listed above], the Respondent had no purpose or interest in terminating the Petitioner, while the Change in Control was occurring, with respect to the Merger Options.

The Respondent is claiming an interpretation of the Agreement which is not supported by it's words. The Respondent drafted the Agreement. The words employed by the Respondent convey that the Change in Control occurred over a time interval, yet the Respondent is offering an alternate interpretation. The Respondent had every opportunity to state plainly and simply when the Change in Control would occur, since the Respondent drafted the Agreement.

For example: A "Change in Control" means the Stockholders of the Company approve an agreement to merge or consolidate into any other entity.

These words would have been consistent with the Respondent's claim. Instead, the Respondent chooses words which connote that the Change in Control occurred during the time interval commencing when the Board of Directors approved the Definitive Merger Agreement, and ending upon the approval by the stockholders. Simultaneously, the Respondent threatened the Petitioner with termination of employment if the Petitioner discussed the Agreement with anyone other than Mr. Belote, the CFO of the Respondent, or the Petitioner's direct manager

(Norman J. Bau Affidavit, #16).[R-287]. Therefore, the Petitioner was precluded from obtaining a review of the Agreement by an attorney, and the Respondent's interpretation of the Change in Control clause comes as a surprise.

The words employed by the Respondent in the Agreement are not consistent with the Respondent's argument. The Petitioner asserts that the Petitioner is entitled to Summary Judgment on Count 2, and moves the Court to grant Certiorari, and subsequently to reverse the decision of the Court below.

CONCLUSION

A merger is a process which spans several months to achieve, rather than a state of completion. If a merger wasn't a merger until it was completed, a merger could never fail.

The Case Law, the dictionary definition of "party", and O.C.G.A. § 14-2-1103, clearly indicate that the Respondent became a party to a merger when the Board of Directors of the Respondent approved the Plan of Merger on February 24, 1998. When the Court of Appeals of Georgia will not apply this to the present Action, the Petitioner's Amendment XIV rights of equal protection are violated.

Having established that the Respondent was a party to the Merger, it follows that construction of the Agreement is required, and it follows that the Petitioner is entitled to Summary Judgment on Count 2 of the Complaint.

Petitioner respectfully prays that this Petition for Writ of Certiorari be granted, and that the decision of the Court below be reversed.

Dated: December 24, 2002

Respectfully submitted,
Norman J. Bau

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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

NORMAN J. BAU,
Plaintiff,

CIVIL ACTION FILE NO.
99VS153088E

v.
ACTAMED CORPORATION,
Defendant.

ORDER

Defendant's Motion for Summary Judgment, filed on June 07, 2000, is currently before this Court for consideration. After a hearing and having reviewed all briefs filed and the record in the above-styled action, the Court finds that there is no genuine issue as to any material fact, and that the Defendant is entitled to judgment as a matter of law. It is

ORDERED AND ADJUDGED, that summary judgment is granted hereby in favor of Defendant against Plaintiff, and that the complaint is dismissed as to all counts.

SO ORDERED, this 10th day of October, 2000.

JUDGE BRENDA H. COLE
State Court of Fulton County

[Distribution list on next page]

March 6, 2002

In the Court of Appeals of Georgia

A01A1776. BAU v. ACTAMED CORPORATION.
MI-078

MILLER, Judge.

Acting pro se, Norman Bau, a former employee of Actamed Corporation, sued the company for breach of contract.[1] After both parties moved for summary judgment, the trial court granted summary judgment to Actamed and denied Bau's motion. Bau appeals this ruling, and upon review, we affirm.

Summary judgment is proper when there is no genuine issue of material fact and when the undisputed facts, viewed most favorably to the nonmoving party, warrant judgment as a matter of law. Lau's Corp. v. Haskins, 261 Ga. 491 (405 SE2d 474) (1991); see OCGA § 9-11-56(c). When reviewing the grant or denial of a motion for summary judgment, this court conducts a de novo review of the law and the evidence. Collier v. State Farm Mut. Automobile Ins. Co., 249 Ga. App. 865, 866(1) (549 SE2d 810) (2001).

The evidence shows that on January 31, 1997, Bau entered into a stock option agreement with his then employer, Actamed. The stock option plan granted Bau an option to purchase 4,000 shares of the common stock of the company. Each year following the grant date (January 31, 1997), one-

[1]The complaint was amended several times and at one point contained four counts, but Bau only appeals from the denial of summary judgment on Count 2.

fifth of the 4,000 shares would vest and Bau then had the option to purchase those shares. On January 31, 1998, 800 shares vested, and Bau exercised the option to purchase those shares.

The stock option plan also contained a provision entitled "Change in Control," which provided that

[n]otwithstanding any provision in this Agreement to the contrary, in the event of a 'change in control' of the Company while the optionee is in 'continuous employment with the Company' (as defined in paragraph 3(b)), this Option shall become immediately exercisable in full. For the purposes of this paragraph ..., a 'change in control' of the Company shall be deemed to occur if (i) *the Company is a party to a merger, share exchange or other business combination pursuant to which the Company does not survive or survives as a subsidiary of another corporation*, or (ii) all or substantially all of the assets of the Company are sold or otherwise disposed of. (Emphasis supplied.) Paragraph 3(b), which governed the optionee's right to exercise the option, provided that the option shall be exercisable "for a period ending 30 days after Optionee is no longer in 'continuous employment with the Company', as provided in paragraph 6(a) provided that

[u]pon termination (for any reason other than death or retirement) of Optionee's 'continuous employment with the Company (as defined in paragraph 3(b) above) and with all its subsidiaries (whether voluntary or involuntary and whether with or without cause), his or her option privileges thereafter shall be limited to the Option Shares which were immediately purchasable by him or her at the date of such termination and such option privileges shall expire unless exercised by him or her within 30 days after

the date of such termination....

On February 24, 1998, Actamed entered into an "Agreement and Plan of Reorganization" to merge with Healtheon Corporation. The merger was subject to Shareholder approval of both companies and was expected to close no later than May 15, 1998.

On May 1, 1998, Actamed terminated Bau's employment with the company, and on May 23, 1998, Bau sought to purchase the 3,200 shares that remained from the stock agreement. Actamed refused to grant Bau the option to purchase the remaining shares because those options had not vested and had expired upon Bau's temination on May 1, 1998.

1. In eight enumerations, Bau argues that there was a "change in control" of Actamed on February 24, when the plan of reorganization was signed, and that therefore Actamed had become a "party to a merger" under the "Change in Control" provision of his stock option plan. Under his reasoning, Bau claims that he was an employee of Actamed during the "change in control" and therefore was entitled to exercise the right to purchase the remaining 3,200 shares as allowed by paragraph 1(c) of the stock option agreement.

Actamed argues that it became a "party to a merger" when the merger was consummated on May 19, 1998, and that as Bau was no longer an employee, the "Change in Control" provision did not apply.

"Where contract language is unambiguous, no construction is necessary and the court must simply enforce the contract according to its clear terms." (Footnote omitted.) Caswell v. Anderson, 241 Ga. App.

703, 703 (527 SE2d 582) (2000). The stock option agreement between Actamed and Bau clearly states that a "change in control" occurs if Actamed is a party to a merger, not when Actamed is a party to an agreement to merge.[2] Moreover, the "Agreement and Plan of Reorganization" states that the companies shall not be merged until the effective time, with the effective time being the closing date of the merger (May 19, 1998). See also OCGA § 14-2-1106 (a merger takes effect when six events occur). Therefore, Actamed became a party to a merger on May 19, 1998, eighteen days after Bau was terminated. Since Bau was no longer with the company, his right triggered by the merger had evaporated.

To be a party to a merger, there must be a merger, not simply a plan to merge. Under the plan of reorganization, the merger itself may have never taken place, as it could have been terminated by the parties. See, e.g., C&S/Sovran Corp. v. First Federal Sav. Bank of Brunswick, 266 Ga. 104, 105 (1) (463 SE2d 892) (1995). Indeed, to allow Bau to exercise his stock options prior to the closing date, when the consummation of the merger is uncertain, would be an absurd result.

Here, the language of both the stock option plan and the plan of reorganization is plain, and "[w]hen the language of an agreement is plain and unambiguous, the court must afford its literal meaning, despite a party's contention that he understood the contract to mean something else." (Citation omitted.) Sofran Peachtree City, L.L.C. v. Peachtree City Holdings, L.L.C., 250 Ga. App. 46, 50 (550 SE2d 429) (2001). Therefore, we see no basis for

[2]Actamed presented evidence that on May 1, 1998, when Bau was terminated, many conditions of the merger had not been satisfied, and that no change in control of Actamed had occurred.

extending the phrase "if the Company is a party to a merger" to begin the date when the plan of reorganization between companies was signed in February as Bau argues. Cf. George L. Smith II Georgia World Congress Center Auth. v. Soft Comdex, Inc., 250 Ga. App. 461, 464(1)(c)(550 SE2d 704). The court did not err in denying summary judgment on this count of Bau's complaint and in granting summary judgment to Actamed.

2. In four enumerations, Bau presents arguments relating to his termination from Actamed. The stock option agreement, however, clearly states that the termination clause applies whether Bau was involuntarily or voluntarily terminated. Moreover, Bau was an at-will employee of Actamed. Therefore, Actamed had a right to terminate his employment at any time without cause. See Hickman Datsun, Inc. v. Foster, 181 Ga. App. 229, 230(1)(351 SE2d 678) (1986). Bau's arguments that he intended to remain employed, and that the "Change in Control" clause was to induce him into remaining in continuous employment with Actamed, are of no significance.

3. Bau's enumeration claiming that the court erred in failing to grant his motion for reconsideration is without merit. As we held in Division 1, the court properly ruled on the motions for summary judgment. See Kruse v. Todd, 260 Ga. 63, 69(4)(389 SE2d 488) (1990); First Community Bank of Cherokee v. Bryan Starr & Assoc., 203 Ga. App. 696, 697 (2)(417 SE2d 330) (1992).

Judgment affirmed. Andrews, P.J., and Eldridge, J. concur.

Court of Appeals
of the State of Georgia

ATLANTA, MARCH 29, 2002

The Court of Appeals passed the following order

Case No. A01A1776
NORMAN J. BAU V. ACTAMED CORPORATION

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerks' Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: September 06, 2002

Norman J. Bau
3764 Pinebrook Drive
Acworth, GA 30102

Case No. S02C1172

NORMAN J. BAU V. ACTAMED CORPORATION

COURT OF APPEALS CASE NO. A01A1776

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S02C1172 Atlanta, September 27, 2002

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

NORMAN J. BAU V. ACTAMED CORPORATION

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

Supreme Court, U.S.
FILED
FEB 5 2003

No. 02-1013

IN THE

Supreme Court of the United States

NORMAN J. BAU,

Petitioner,

v.

ACTAMED CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Actamed Corporation was merged into Envoy Corporation in 2002 and is now known as Envoy Corporation. Envoy Corporation is a wholly owned subsidiary of WebMD Corporation, a publicly held company.

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JURISDICTIONAL BASIS

Respondent Actamed Corporation submits that this Court is without jurisdiction to grant certiorari and to hear this case for two main reasons: (1) The Supreme Court's review of state court judgments is limited to the federal questions decided by the state courts. 28 U.S.C. § 1257. Because the Petition presents no federal question, this Court lacks jurisdiction over this case; and (2) Further, because Petitioner Norman J. Bau has failed to demonstrate that the lower courts addressed the purported federal issue herein, or even that he properly presented this issue below, the Court lacks jurisdiction. *See Adams v. Robertson*, 520 U.S. 83 (1997).

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1

STATEMENT OF THE CASE

Petitioner Norman J. Bau ("Petitioner") is a former employee of Respondent Actamed Corporation, now known as Envoy Corporation, ("Respondent") who contends that he had the contractual right to purchase 3200 Actamed shares as of May 1, 1998, the date his employment ended. Notwithstanding Petitioner's recent, transparent attempt to garb this case in equal protection attire, at the heart of this dispute is an unambiguous contract that the Georgia state courts enforced according to its plain terms.

On or about January 31, 1997, Petitioner and Respondent entered into the employee stock Option Agreement (the "Option Agreement") granting Petitioner an option to purchase 4,000 shares of the common stock of the company.

Record 248-259. The Agreement provided that if Petitioner's employment ended for any reason, his right to exercise his options would also end, except for shares that were already vested as of the date of the termination. Record 252.

The Option Agreement provided that all unvested shares would vest upon a "change in control" of Respondent, so long as Petitioner was employed when the change in control occurred. Record 249. Specifically, the Option Agreement states:

> 1. *Option*
>
> . . .
>
> (c) *Change in Control.* Notwithstanding any provisions in this Agreement to the contrary, in the event of a "change in control" of the Company while the Optionee is in "continuous employment with the Company" (as defined in paragraph 3(b)), this Option shall become immediately exercisable in full. For the purposes of this paragraph 1(c), a "change in control" of the Company shall be deemed to occur if (i) the Company is ***a party to a merger, share exchange or other business combination pursuant to which the Company does not survive or survives as a subsidiary of another corporation***; or (ii) all or substantially all of the assets of the Company are sold or otherwise disposed of.

Id. (emphasis supplied).

On February 24, 1998, Respondent, Healtheon Corporation, and Mednet Acquisition Corporation entered into an Agreement and Plan of Reorganization (the "Plan of Reorganization"), which outlined the terms of a prospective merger. Record 174-238. Under the Plan of Reorganization, the parties were not to merge until all of the conditions set forth in the Plan occurred. Among other things, the Plan contained *five (5)* pages articulating *thirty-three (33)* separate conditions precedent to the consummation of the merger, including for instance, shareholder approval and clearance from a variety of state and federal regulatory authorities. Record 227-232. If all thirty-three of these conditions were not satisfied, there would be no merger. *Id.* Furthermore, the Plan of Reorganization itself provided for a Closing Date of on or around May 15, 1998 and an "Effective Date" as of the date of the filing of the Articles of Merger with the Secretary of the State of Georgia. Record 179.

Respondent terminated Petitioner's employment effective May 1, 1998. Record 170. The merger had not occurred, and the Articles of Merger had not been filed as of this date. Record 170. Petitioner has admitted that "Actamed and Healtheon had not merged prior to the termination of [Petitioner's] employment with Actamed," that "Actamed operated as an independent company after the termination of [Petitioner's] employment with Actamed," and that "Actamed was not a subsidiary of Healtheon" as of May 1, 1998. Record 142, 138. Furthermore, many of the thirty-three conditions in the Plan of Reorganization had not been satisfied as of May 1, 1998, including specifically, but without limitation, the required approval hearing by the California Commissioner of Corporations and shareholder approval. Record 170-171.

On or about May 12, 1999, Petitioner filed his Complaint in Georgia state court, seeking, *inter alia*, specific performance as to some 3,200 shares that had not automatically vested as of the date of his termination. Record 005-023, 007-008. The Georgia trial court granted Respondent's motion for summary judgment. App. 1. The Georgia Court of Appeals affirmed the grant of summary judgment to Respondent on or about March 6, 2002 and subsequently denied Petitioner's Motion for Reconsideration. App. 2, 7. The Georgia Supreme Court denied certiorari. App. 8.

REASONS FOR DENYING THE PETITION

I. This Matter Presents No Equal Protection Issue and Does Not Merit the Grant of Certiorari.

For the first time, Petitioner argues that he has been denied Fourteenth Amendment equal protection on the theory that the state courts incorrectly applied, or failed to apply, Georgia law herein: "When the Georgia case law infers that the Respondent became a 'party to the merger' on February 24, 1998, and the Court of Appeals of Georgia will not apply that case law to the present Action, the Petitioner is being denied equal protection of the law."[1] Pet. at 5. In short, because Petitioner feels the lower courts incorrectly decided this matter, Petitioner believes he has been denied equal protection under the law. This is the sole issue Petitioner has presented for review. Pet. at *i*. Petitioner merely has restated his earlier state law arguments, which have failed numerous times previously, now attempting to garb these arguments in equal protection attire.

1. Although Petitioner references "case law," his Petition later makes clear that he relies on two Georgia statutes, O.C.G.A. §§ 14-2-1103 and 24-6-5, in support of his position that his stock options vested as of the date of his termination. Pet. at 5.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment guarantees "a right to be free from invidious discrimination in statutory classifications and other government activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). The Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

Petitioner vaguely asserts that he is among a "distinct class of individuals which receive [sic] an improper and incorrect application of a State statute, by the State Courts." Pet. at 5. But there can be no question but that Petitioner has failed to demonstrate that a governmental classification intentionally has subjected him to treatment different from similarly situated individuals and therefore that equal protection is implicated. He simply disagrees with the lower courts' application of Georgia law to the facts of this case. Because Petitioner does not allege any sort of invidious classification, his petition presents no equal protection challenge. Under Petitioner's theory, any adverse decision of any state court concerning state law raises a federal constitutional issue and calls upon this Court to re-examine the lower courts' rulings under applicable state law to ensure that the equal protection guarantee has been met. This theory is fatally flawed. Petitioner's attempt to disguise his disagreement with the state court rulings as an equal protection issue is transparent and unpersuasive.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion" to be granted only "for compelling reasons." Sup. Ct. R. 10. Here, the asserted error consists only of "the misapplication of a properly stated rule of law." *See id.* Accordingly, the grant of certiorari is not merited.

II. The Court Lacks Jurisdiction Over this Matter.

Furthermore, the Supreme Court's review of state court judgments always has been limited to the *federal questions* decided by the state courts. *See* 28 U.S.C. § 1257; Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 3-24 (2d ed. 1988). Without a federal question presented, this Court lacks jurisdiction over this case.

III. Petitioner Failed to Address or Properly Present the Federal Equal Protection Issue to the Lower Courts.

"With 'very rare exceptions,'" the Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)). Moreover, when the highest state court is silent on the federal question presented to the Supreme Court, the Court "assume[s] that the issue was not properly presented." *Adams*, 520 U.S. at 86. The Court did not decide whether the rule set forth in *Adams v. Robertson* was "jurisdictional or prudential" but stated that it served "an important interest in comity." *Adams*, 520 U.S. at 90.

Here, the Georgia Supreme Court denied Petitioner's Petition for Certiorari as of September 6, 2002 (App. 8), and thus never addressed the federal equal protection question submitted to this Court. Indeed, contrary to Petitioner's assertion (Pet. at 6), Petitioner's *Petition for Certiorari* submitted to the Georgia Supreme Court never even mentions the Equal Protection Clause of the Fourteenth Amendment, although it briefly references the equal protection clause of Georgia's state constitution. *See* Petitioner's *Petition for Certiorari* to the Supreme Court of Georgia, at 3. *See also Appellant's Motion for Reconsideration* to the Supreme Court of Georgia (no mention of federal equal protection issue). Likewise, the Georgia Court of Appeals decision (App. 2), does not address the federal (or state) equal protection issue, and Petitioner's Courts of Appeals briefs made no mention of any state or federal equal protection issue. *See Brief of Appellant*, *Reply Brief of Appellant*, and *Appellant's Motion for Reconsideration* submitted to the Georgia Court of Appeals. Accordingly, Petitioner has failed to carry his burden of demonstrating that the purported federal issue was addressed by the lower courts or even properly presented to them. Thus, the Court should not grant certiorari to address the purported equal protection issue.

IV. Petitioner's Substantive State Law Arguments Are Meritless, As the Lower Courts Have Confirmed.

Petitioner relies on O.C.G.A. § 14-2-1103[2] in support of his argument that a "change in control" had occurred as of February 24, 1998 when Respondent entered into the Plan of Reorganization and became a "party to a merger." Therefore, he asserts that his shares had vested as of the date of his termination on May 1, 1998. Pet. at 4-5. O.C.G.A. § 14-2-1103 provides as follows:

> After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger and the board of directors of the corporation whose shares will be acquired in the share exchange shall submit the plan of merger (except as provided in subsection (h) of this Code section) or share exchange for approval by its shareholders.

O.C.G.A. § 14-2-1103(a).

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2. Petitioner also points to O.C.G.A. § 24-6-5 as having been incorrectly applied below. Pet. at 4. This provision, however, merely provides that "[e]vidence of known and established usage shall be admissible to aid in the construction of contracts." O.C.G.A. § 24-6-5. This provision has no bearing herein because the Option Agreement is unambiguous on its face and should be enforced according to its terms, as the Georgia Court of Appeals found (App. 4-5) and as Petitioner has earlier acknowledged. *See Petition for Certiorari* to the Georgia Supreme Court, at 3 ("The words of the Agreement defining 'Change in Control' are precise and clear.").

O.C.G.A. § 14-2-1103, however, plainly sets forth the mandatory procedure for a board of directors to follow to obtain shareholder approval and makes clear that shareholder approval is a condition precedent to a merger or share exchange under Georgia law. By no means does this code section support Petitioner's proposition that a "change of control" had occurred, or "was occurring," prior to the time that shareholder approval was obtained and the merger actually took place. At bottom, Petitioner's argument that Respondent was a "party to a merger" prior to May 19, 1998 is nonsensical and turns the plain language of the Option Agreement on its head. As noted by the Georgia Court of Appeals, "To be a party to a merger, there must be a merger, not simply a plan to merge." App. 5.

Under the unambiguous terms of the Option Agreement, the "change of control" did not occur until Respondent ceased to exist as an independent entity and/or became a subsidiary of another corporation. Simply by entering into the February 24, 1998 Plan of Reorganization, Respondent had not ceased to survive and/or had not become a subsidiary of Healtheon. By its own terms, the Plan of Reorganization was merely a "plan" for a prospective merger which could actually occur in the future if all thirty-three (33) express conditions precedent set forth therein were fulfilled. The record is uncontroverted in this case that many of these conditions precedent, including the required approval hearing before California's Commissioner of Corporations and shareholder approval, had not occurred as of the date of Petitioner's termination. Record 170-171. Accordingly, there can be no question but that the merger had not, and indeed could not, have occurred as of May 1, 1998. Moreover, as emphasized by the Georgia Court of Appeals (App. 5), there can be no question that as of the date of Petitioner's termination, the merger may not have occurred at all.

Rather, Respondent ceased to "survive or survive[d] as a subsidiary of another corporation," and the "change in control" was effected, only when the merger ultimately occurred. *See* O.C.G.A. § 14-2-1106 (it is only "[w]hen a merger takes effect" that "every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases"). The Plan of Reorganization itself provided for a Closing Date of on or around May 15, 1998 and an "Effective Time" as of the date of the filing of the Articles of Merger with the Secretary of the State of Georgia. Record 179. The merger had not closed, the Articles of Merger had not been filed, and the merger thus was not "Effective" as of May 1, 1998. Record 170. Georgia law even expressly provides that a merger document may provide for a delayed effective date. O.C.G.A. § 14-2-123(b). Thus, according to the Plan of Reorganization itself and Georgia law, the merger and resulting "change in control" had not occurred as of May 1, 1998. Contrary to Petitioner's urgings, and as the lower courts held, the Option Agreement is unambiguous on its face and therefore should be enforced according to its terms.[3] *Caswell v. Anderson*, 527 S.E.2d 582, 582 (Ga. Ct. App. 2000).

In summary, Petitioner's arguments as to why the lower courts incorrectly applied Georgia law are without merit, and plainly do not translate into a federal equal protection issue.

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3. Indeed, although Petitioner now argues that the Option Agreement is ambiguous (Pet. at 8), he previously has conceded that it is unambiguous. *See Petition for Certiorari* submitted to the Georgia Supreme Court, at 3 ("The Words of the Agreement defining 'Change in Control' are precise and clear.").

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny certiorari herein.

Respectfully submitted,

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No. 02-1013

In The
SUPREME COURT
UNITED STATES OF AMERICA

Norman J. Bau
Petitioner,
vs.
Actamed Corporation
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA:

REPLY TO BRIEF IN OPPOSITION

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I. THIS MATTER RAISES A FEDERAL EQUAL PROTECTION ISSUE

Georgia case law stated: "Dictionaries may supply a plain and ordinary sense of a word," (Shopping Ctr. v. Basic Bus. Alternatives, Inc., 213 Ga App 722, 445 S.E.2d 824 (1994)). Webster's dictionary defines "party" as: one participating, or otherwise involved in something. (Norman J. Bau Affidavit, #12) [R-287]. When the Merger was approved by the Board of Directors of the Respondent on February 24, 1998, the Respondent began participating in the Merger and was involved in the Merger, hence became a "party to the Merger". The Court of Appeals of Georgia would not apply this Case Law to the present Action. The Court of Appeals of Georgia had no comment about this, in the Opinion.

The Georgia statute O.C.G.A. § 14-2-1103 states: "After adopting a plan of merger ... the board of directors of each corporation party to the merger [emphasis supplied by the Petitioner] ... shall submit the plan of merger ... for approval by its shareholders." The Georgia statute O.C.G.A. § 24-6-5 states: "Evidence of known and established usage shall be admissible to aid in the construction of contracts..." O.C.G.A. § 14-2-1103 calls the Respondent a "party to the merger" just after the plan of merger is approved by the Board of Directors, and submitted for approval to the shareholders. This occurred on February 24, 1998; hence the Respondent became a "party to the Merger" at this time. The Court of Appeals of Georgia would not apply this inference from this statute to the present Action. The Court of Appeals of Georgia had no comment about this, in the Opinion.

The Court of Appeals of Georgia would not apply these authorities to the present Action even though the Respondent provided no alternate authority that defined when the Respondent became a "party to the Merger". These omissions of action by the Court of Appeals of Georgia rise to the level of implicit partiality, and raise a Federal Equal Protection violation. This represents a compelling reason for review on a writ of certiorari.

II. THE FEDERAL EQUAL PROTECTION ISSUE WAS IMPLICITLY RAISED IN THE COURTS BELOW

The Petitioner cited the Case Law, Shopping Ctr. v. Basic Bus. Alternatives, Inc., 213 Ga App 722, 445 S.E.2d 824 (1994), and the dictionary definition of "party" in his brief to the Court of Appeals of Georgia. The Petitioner cited O.C.G.A. § 14-2-1103 and O.C.G.A. § 24-6-5 in his brief to the Court of Appeals of Georgia. The Court of Appeals of Georgia was silent, in its Opinion, relative to the above Case Law and Georgia statutes, in the determination of when the Respondent became a "party to the Merger". The Petitioner restated the dictionary definition of "party" in his Motion for Reconsideration to the Court of Appeals of Georgia, and again discussed its relevance as to when the Respondent became a "party to the Merger," and the Change in Control. The Petitioner restated O.C.G.A. § 14-2-1103 in his Motion for Reconsideration to the Court of Appeals of Georgia, and again discussed its relevance as to when the Respondent became a "party to the Merger". The Court of Appeals of Georgia was undoubtedly aware of the Equal Protection right to have these issues addressed. The Petitioner thereby directed the attention of the Court of Appeals of Georgia to this Case Law, O.C.G.A. § 14-2-1103,

and O.C.G.A. § 24-6-5, again, in the Motion for Reconsideration. The Equal Protection issue was thereby implicitly raised in the Court of Appeals of Georgia in a non-inflammatory manner. To have demanded a response to these issues in the Motion for Reconsideration, stating the Petitioner's Equal Protection Right, would have appeared contemptuous; a more polite approach was followed. It is not customary for the Court of Appeals of Georgia to remain silent on important issues raised by appellants. The Court of Appeals of Georgia was silent, again, on these issues in its response to the Motion for Reconsideration. The Court of Appeals of Georgia was certainly aware of the equivalence of the State and Federal Equal Protection guarantees.

The State guarantee of Equal Protection, and its violation, was raised to the Supreme Court of Georgia in the Petition for Certiorari. Certainly the Supreme Court of Georgia was aware of the equivalence of the State and Federal Equal Protection guarantees, and that a Federal issue was implicitly being raised by the Petitioner. The State guarantee of Equal Protection, and its violation, was again raised to the Supreme Court of Georgia in the Motion for Reconsideration. Again, the Supreme Court of Georgia was certainly aware that a Federal issue was implicitly being raised. The fundamental equivalence of the State and Federal guarantees is basic.

III. RESPONDENT'S STATE LAW ARGUMENTS AND THE FACTS ARE INCONGRUOUS

The Respondent's argument on pages 8-10 of the Brief in Opposition is flawed. The Respondent cites O.C.G.A. § 14-2-1103(a), "After adopting a plan of merger ... the board of directors of each corporation party to the merger ... shall submit the plan of merger ... for approval by its shareholders." This proves the Respondent's argument to be incorrect, because it shows that the Merger was a process that spanned several months, commencing at the approval by the Board of Directors, and completed upon the approval by the Shareholders. The Respondent became a "party to a merger" upon its approval by the Board of Directors, and continued to be a "party to a merger" while this process ran its course. The Merger was occurring while this process was occurring. Should the Merger have been aborted, the Respondent would have been a "party to a merger" which failed.

In footnotes 2 and 3 on pages 8 and 10, respectively, of the Brief in Opposition, the Respondent takes the Petitioner's words completely out of context. The Petitioner stated, "The words of the Agreement defining 'Change in Control' are precise and clear." Section 1(c) of the Agreement stated, "A 'change in control' of the Company shall be deemed to occur if ... the Company is a party to a merger ... pursuant to which the company ... survives as a subsidiary of another corporation." **This** part of the Agreement **defines 'Change in Control'** and **this** part of the Agreement **is** precise and clear: **The Change in Control began when the Respondent became a party to the Merger, when the Board of Directors approved the Merger; the Change in Control ended when the Respondent survived as a subsidiary of Healtheon.** The remainder of Section 1(c) **does not define** 'Change in Control,' and **this** part **is not** precise or clear. Specifically, "... in the event of a 'change in control' of the Company while the Optionee is in 'continuous employment with the Company' ..." is ambiguous, because the Change in Control is occurring, but not completed, while the Petitioner is in continuous employment. The

Respondent takes this completely out of context.

IV. CONCLUSION

The preceding argument has documented why a Federal Equal Protection issue exists, how the Federal Equal Protection issue was implicitly raised in the courts below, and why the Respondent's State Law arguments are invalid. For all the foregoing reasons, and the reasons outlined in the Petition, the Petitioner respectfully prays that the Petition for Writ of Certiorari be granted, and that this ultimately leads to a reversal of the decision of the Court below.

Dated: February 14, 2003

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